No. 400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

THE LINEN THREAD COMPANY, LTD.,
Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Prew Savoy, on behalf of the Linen Thread Company, Ltd., prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled case on May 15, 1942, and with respect to which a petition for Re-Hearing was denied June 19, 1942.

Opinions Below

The memorandum opinion of the United States Board of Tax Appeals (R. 24) not reported, is found in 1942 CCH, Par. 7032. The opinion on which it is

based, wherein is a dissent, is to be found in the Appeal of Aktiebolaget Separator, 45 B.T.A. 243. The opinion of the Circuit Court of Appeals (R. 39) is reported in 128 F.(2d) 166.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered May 15, 1942 (R. 44). Petition for Rehearing was filed June 12, 1942 (R. 46), was duly ordered received, and was denied June 19, 1942 (R. 51). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1925.

Questions Presented

1. Did the maintenance by Petitioner, within the United States, in the tax years 1937 and 1938, of an office of the character and for the purposes disclosed in the record and found by the Board, bring it within the classification of a resident foreign corporation, as defined by Section 231 (b) of the Revenue Acts of 1936 and 1938, so that its taxable status was fixed by said Section 231 (b); or was it, despite the maintenance of such office, a non-resident corporation, within the meaning of Section 231 (a) and therefore taxable under such sub-section, because it was not engaged in trade or business other than as found by the Board?

2. Did the Circuit Court of Appeals correctly in-

terpret Section 231 of the Revenue Acts of 1936 and 1938, in its decision and its denial of the Petition for Rehearing, in view of Congressional action in interpretation of the provisions thereof?

Statutes and Regulations Involved

Revenue Act of 1938:

"Sec. 53. Time and Place for filing returns.

* * *

"(b) To Whom Return Made

* * *

"(2) Corporations.—Returns of corporations shall be made to the collector of the district in which is located the **principal place of business* or *principal office* or *agency* of the corporation, or if it has no principal place of business or principal office or agency in the United States, then to the collector at Baltimore, Maryland.

"Sec. 211. Tax on nonresident alien individuals.

"(b) *United States Business or Office.* — A nonresident alien individual engaged in trade or business in the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a). * * *"

"Sec. 231. Tax on Foreign Corporations.

"(a) Nonresident Corporations.—There shall

* Italics Supplied.

be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States **and* not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, except that in the case of dividends the rate shall be 10 per centum, and except that in the case of corporations organized under the laws of a contiguous country such rate of 10 per centum with respect to dividends shall be reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country. For inclusion in computation of tax of amount specified in shareholder's consent, see section 28.

"(b) Resident Corporations.—A foreign corporation engaged in trade or business within the United States **or* having an office or place of business therein shall be taxable as provided in section 14 (e) (1)."

* * *

Regulations 101 — (Revenue Act of 1938)

Article 231-1 (b) provides, in part, as follows:

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* Italics Supplied.

"Whether a foreign corporation has an 'office or place of business' within the United States depends upon the facts in a particular case. The term 'office or place of business,' however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected."

The provisions of Section 231 of the Revenue Act of 1936 are substantially the same as the corresponding statutory provisions above quoted, and the pertinent part of Article 231 (b) of Regulations 94 is the same as the corresponding Regulations above quoted.

Statement

The Petitioner was incorporated under the laws of Scotland, with its manufacturing plants in Scotland and Ireland and its head office in Glasgow, Scotland. It holds large investments in the United States, Scotland and other foreign countries, and sells, in Scotland, its manufactured products to its *wholly-owned* American subsidiary, The Lenin Thread Co., Inc., a Delaware corporation.

The Petitioner filed Federal income tax returns on a calendar year basis, for each of the years 1937 and 1938 with the Collector of Internal Revenue for the Third District of New York. The returns were prepared in the United States by Petitioner's resident agent, were executed by the Petitioner's officers in Glasgow, and sent to the United States for filing with the Collector of Internal Revenue.

Tax withheld for 1937 exceeded Petitioner's tax liability as shown by its return for that year, and

Petitioner filed a claim for refund of the excess amount of tax withheld. The Petitioner paid an income tax for the year 1938 in the amount of $11,156.33.

William J. MacInnis was the resident agent of the Petitioner and held a power of attorney-in-fact for the Petitioner in the United States. For over thirty years prior to 1937, and not thereafter, he had been connected with the Petitioner's American subsidiary as salesman, factory manager, and vice-president. As Petitioner's resident agent, he received the dividends from the Petitioner's investments in the United States, consisting of shares of stock of the American Thread Co., United Shoe Machinery Corporation and The Linen Thread Co., Inc., and also the interest due Petitioner by its American subsidiary on indebtedness incurred in the purchase of goods in Scotland. Petitioner's Resident Agent deposits the money so received in a New York bank, maintains adequate bank balances for all purposes, pays the rent and taxes and all other expenses incident to Petitioner's "regular business" in the United States. He files all Federal and State tax returns, information returns, and the numerous reports required by the State of New York as well as the various bureaus of the United States. He keeps complete records of all income and expenses and has his books regularly audited, in addition to which he keeps his principal, the Petitioner, in Glasgow, informed regarding all information he can obtain pertaining to any changes in general business or its products which would affect Petitioner, such as the use of "nylon" as a substitute for thread, etc., etc.

The Petitioner does not engage in business, in the legal sense, other than as found by the Board, in the United States, and its activities in the United States are confined entirely to those above stated.

In 1937 Petitioner's resident agent had an office in the Central Hanover Bank Building, New York City, and in December, 1937, moved into the Chanin Building at 122 East 42nd Street, New York City, where he rents a room on a monthly basis, the lease naming Petitioner as tenant. During 1938 the resident agent maintained this office in the Chanin Building. The Petitioner employed no clerk or stenographer at this office, but called on the permanent staff of the owners of the building, maintained for this purpose, for such service, when required. The Petitioner's name appears on the office door, and in the New York City telephone book. The office is furnished, and a ledger, journal and cash book to record receipts and expenditures, are maintained there.

The Commissioner of Internal Revenue ruled that Petitioner was not a resident foreign corporation in 1937 and 1938, holding that Petitioner did not maintain an "office or place of business" in the United States, because it was not regularly engaged in trade or business in the United States, and asserted deficiencies in tax. The majority of the Board of Tax Appeals (in *Aktiebolaget, supra*) upheld the Commissioner, holding that maintaining an office or place of business requires the doing of trade or business or an intent to do so. The minority opinion of the Board dissented therefrom, on the ground that the statute sets up two distinct categories of resident for-

eign corporations; (1) those engaged in trade or business, and (2) those maintaining an office or place of business, and that the majority opinion confuses the two by in fact finding only one category in the statute; and on the further ground that on the facts in this case, holding petitioner to be a resident foreign corporation does no violence to the Regulations applicable. The Board followed the majority opinion in deciding the instant case. The Circuit Court of Appeals affirmed the decision of the Board, misapplying the regulations to the facts and misapplying the principle that weight is to be given the fact that departmental interpretation has not led to a change in the statute, in its decision and in its denial of the Petition for Rehearing.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding that, because Petitioner was not engaged in trade or business within the United States and did not intend to do so, in 1937 and 1938, it was not a resident foreign corporation and taxable as such under Section 231 (b) of the Revenue Acts of 1936 and 1938.

2. In holding that, because Petitioner was not engaged in trade or business within the United States and did not intend to do so, in 1937 and 1938, it was a non-resident foreign corporation and taxable as such under Section 231 (a) of the Revenue Acts of 1936 and 1938.

3. In failing to hold that Petitioner, a foreign cor-

poration, maintaining an office within the United States under the circumstances appearing in the record and found as facts by the Board, is a resident foreign corporation and taxable as such under the provisions of Section 231 (b) of the Revenue Acts of 1936 and 1938.

4. In misapplying the applicable Regulations by holding in substance that Petitioner's office was a place where casual or incidental transactions were effected.

5. In misapplying the principle that the subsequent re-enactment of a statute unchanged amounts to an adoption of the Regulations in interpretation thereof.

6. In refusing to re-hear the case to consider Congressional interpretation of the Revenue Acts of 1936 and 1938 in pending legislation on the subject.

7. In affirming the decision of the Board of Tax Appeals.

Reasons for Granting the Writ

1. The case is of considerable importance to a large number of foreign corporations as is evidenced by the representations of the Treasury Department to the Committee on Ways and Means of the House, on June 5, 1942, in connection with H.R. 7378, now before the Senate Finance Committee (September 13, 1942):

> "The present law divides nonresident aliens and foreign corporations into two classes for income tax purposes.

"(a) Those not engaged in trade or business within the United States and not having an office or place of business therein; and

"(b) Those engaged in trade or business within the United States or having an office or place of business therein.

"Those falling in classification (a) are taxed generally at a flat rate upon the gross amount of dividends, interest, and other fixed or determinable annual, periodical income from sources within the United States and are not allowed any deductions or credits. Those falling within classification (b) are taxed generally under the same treatment accorded ordinary taxpayers and are entitled to deductions allocable to United States income and to appropriate credits. This provision has been abused principally by foreign corporations which hold substantial amounts of stock in domestic corporations. By establishing a nominal 'office or place of business in the United States' they can avoid the treatment accorded foreign countries as described above and thus secure deductions and credits.

*"*This amendment would require that in order to get this treatment a foreign corporation or nonresident alien must actually be engaged in trade or business within the United States.*"

There are a great many foreign corporations whose tax status will be affected by a determination of this

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* Italics Supplied.

question for the years 1936 through 1942, a question never previously before this Court. In view of the complexity of their problems in the United States as a result of the war, friendly foreign corporations should be given the maximum consideration by our highest Court, when a review of a general question not previously considered is sought.

2. The decision of the Circuit Court of Appeals herein, in the matter of the weight given Departmental Regulations, is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Magruder* v. *Wash. B. & A. R. Corp.*, 120 F. (2d) 441, cert. granted 314 U. S. 601, and the decision of this Court, in *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, and is erroneous.

3. The decision of the Court below is erroneous, for the following reasons:

(a) The activities of Petitioner within the United States—investments in operating companies—constituted part of the business for which Petitioner was organized — manufacturing *and investments.* See *Phillips* v. *International Salt Co.*, 274 U. S. 718; *Edwards* v. *Chile Copper Co.*, 270 U. S. 452.

(b) However, to fulfill the statutory requirement that it have an "office or place of business" in the United States, Petitioner was not required to do business. Congress had in mind at least two different kinds of resident foreign corporations (1) those engaged in trade or business, and (2) those having an office or place of business in the United States. If there are not two categories, one of which is not required to do business, the phrase "office or place of

business" is unnecessary and meaningless, as the term "engaged in trade or business" would cover every *quantum* of business. Congress is presumed to have used meaningful language and to have given meaning to all words in the statute. *Graham* v. *Goodcell*, 282 U. S. 409, *U. S.* v. *Updike*, 281 U. S. 489.

(c) A reading of Section 53 (b) and of Section 211 (b), *supra*, p. 3 in conjunction with Section 231 of the Revenue Acts of 1936 and 1938, requires the conclusion that there are three categories of foreign corporations required to file returns—(1) those engaged in trade or business; (2) those maintaining an office and (3) those maintaining a place of business. Only by such a conclusion can all parts of the statute be given full meaning. The Circuit Court of Appeals ignored the fundamental rule that every material part of a statute is to be read together. *Hellmich* v. *Hellman*, 276 U. S. 233/237; *Kohlsaat* v. *Murphy*, 96 U. S. 153/159; *U. S.* v. *Fisher*, 6 U. S. 358/386.

(d) The legislative history of Section 231 of the Revenue Act of 1936 — the Committee Reports, shows definitely that, where a foreign corporate taxpayer could be reached in this country, he would be compelled to file a return and pay the tax, but when he could not be reached, the tax would be withheld —the two systems of collection implementing one another. Petitioner was the very type of corporation which could be reached and was required to file a return under Section 231 (b). (House Report No. 2475 and Senate Report No. 2156 on H.R. 12395, 1936.)

(e) The holding sought by the Petitioner does not

do violence to the Regulations, since the requirement therein that business be regular and not casual relates only to the doing of business. However, if the Regulations do go further and require the doing of business, then they are contrary to the express language of the statute and are illegal. *Manhattan Co.* v. *Commissioner, supra.*

(f) The application in this case of the principle that Congress, by re-enacting the language of the 1936 Act in 1938 and thereafter, has approved the Departmental Regulations in interpretation thereof is wrong for two reasons. In the first place, Petitioner complains of the *Ruling* in its case—namely, that it must carry on some trade or business beyond that of handling investments, in order to qualify as a resident foreign corporation—not with the Regulations to the effect that any such business, or any business, must be regular and not just casual. (If the Regulations go beyond this, they are invalid. *Supra,* (e).) In the second place, it is evident from H.R. 7378 and from an examination of tax legislation since 1936 that Congress is now considering the language of Section 231 of the 1936 and 1938 Acts *for the first time since 1936,* and is for the first time considering striking out the words "office or place of business," and requiring the doing of trade or business to qualify as a resident foreign corporation. Where specific language is known to have been considered by Congress, there is basis for the principle applied herein. *Taft* v. *Commissioner,* 304 U. S. 351. But its general application, in the presence of hundreds of thousands of pages of Government Regulations annually—when the fact is *known* that Con-

gress has not considered the specific language involved—is beyond all reason. Particularly is this true, when some members of this Court know of their own knowledge that Congress can not be, and is not, familiar with Regulations and *Rulings*, except when they are brought to the specific attention of the Committees.

(g) The legislative history of H.R. 7378, as well as the Bill itself, constitute the interpretation by Congress of Section 231 of the Revenue Acts of 1936 and 1938. *U. S.* v. *Freeman*, 3 Howard 556; *Cope* v. *Cope*, 137 U. S. 682; *Marchie Tiger* v. *Western Investment Co.*, 221 U. S. 286. That legislation and legislative history supports the conclusion that a foreign corporation, such as Petitioner, maintaining an office solely to look after its investments, is a *resident* foreign corporation, required to file a return under Section 231 (b) of the Revenue Acts of 1936 and 1938, and that the Circuit Court of Appeals erred in holding to the contrary.

Conclusion

It is respectfully submitted that this Petition should be granted.

PREW SAVOY,
Attorney for Petitioner.

September, 1942.